RECENT CASES

Agency—War—Effect of War on Existing Agency Relationships—[New York].—In 1914, plaintiff's predecessors in interest, who lived in Germany, engaged defendant, a resident of New York, as their agent to perform general agency services for reinsurers in the United States. After the War, the defendant began procuring fire reinsurance treaties and received commissions on the premiums arising therefrom. Plaintiffs maintain that the defendant received all commissions as their agent. The trial court held that the declaration of war by the United States against Germany in 1917, together with the passage of the Trading with the Enemy Act, terminated the agency agreement between the parties, and that the defendant, being free to make his own arrangements, had acquired independent and absolute title to the money. It was also held that the Alien Property Custodian had acquired plaintiff's right to the commissions by his seizure of enemy property and that the action was barred by the statute of limitations. On appeal, *held*, affirmed. *Mutzenbecher v. Ballard*, 266 N.Y. 574 (1935).

Upon the outbreak of war, existing agency relationships are generally terminated when the agent and principal are residents of opposed and belligerent countries. 1 Mechem, Agency § 694 (1914). Some courts reach this conclusion by arguing that since intercourse is prohibited between belligerents, any agency relation in which intercourse is contemplated should be dissolved upon the instigation of war. *Montgomery v. U.S.*, 15 Wall. (U.S.) 395 (1872); *Blackwell v. Willard*, 65 N.C. 555 (1871). If intercourse is not contemplated, the relationship is not dissolved. *Small's Adm'r v. Lumpkin's Ex'r*, 28 Gratt. (Va.) 832 (1877) (agency to collect debts and sell property); *Williams v. Paine*, 7 App. D.C. 116 (1895), aff'd 169 U.S. 55 (1897) (agency to sell land); *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614 (1871). Other jurisdictions regard all agencies as automatically terminated when hostilities begin, regardless of the absence of actual communication. *Howell v. Gordon*, 40 Ga. 302 (1869) (agency to care for certain lots of land). To justify this view, it has been urged that all agencies involve either the actuality or the possibility of communication and intercourse. 31 Harv. L. Rev. 637 (1918). The first two theories are thus influenced by substantially similar considerations: the dangers of intercourse between belligerents. A third theory is that the interest of the principal must determine the continuation of the agency relation. If it is in the interest of the principal that his agent in the belligerent country should continue in that capacity, the assent of the principal will be presumed in the absence of evidence to the contrary; but if it is against his interests, then the agency will be presumed to have been terminated. *Insurance Co. v. Davis*, 95 U.S. 425, 429 (1877) (terminated); *Williams v. Paine*, 169 U.S. 55, 73 (1897) (not terminated).

Whether these views meet the needs of the community is highly debatable. Perhaps the test of termination should be whether the relationship benefits the enemy or prejudices the interests of the domestic country. *Hubbard v. Matthews*, 54 N.Y. 43 (1873). So long as not all intercourse between belligerents is forbidden, but only that which is opposed to public policy, agencies that do not involve loss or harm to government might be sustained, whether or not they involve intercourse and whether or not they

are beneficial to the principal. Such a standard, although possibly having an unfortunate operation in some cases, is not only not unduly restrictive of war-time relations but coincides with the policy of our war-time legislation, in which prevention of benefit to the enemy, not the indiscriminate prevention of all intercourse, is the guiding objective. *Tingley v. Muller*, [1917] 2 Chanc. 144; *Keppelman v. Keppelman*, 89 N.J. Eq. 390, 105 Atl. 140 (1918), revd. on other grds., 91 N.J. Eq. 67, 108 Atl. 432 (1919); see *Tait v. N.Y. Life Ins. Co.*, 23 Fed. Cas. 620, 624 (1873). There is no danger inherent in intercourse. It is only when it prejudices the interests of the government that the agency relation which induced it should be terminated. *Cf.* 31 Harv. L. Rev. 637 (1918). The unfairness of such termination by means of the orthodox approach is particularly evident in the principal case, where the defendant was not held bound to his agency contract though he did not begin his work until 1919, when hostilities had ceased.

Bankruptcy—Preferences—Date for Determining Preferential Character of Payment—[Massachusetts].—Action was brought by a trustee in bankruptcy to recover partial payments made by the bankrupt to the defendant creditor within four months of filing of the petition in bankruptcy. The defendant maintained that no preference was effected because, at the time of the payment, the debtor's assets were large enough to have permitted similar payments to all creditors. *Held*, there was a preference, because the preferential character of a transfer is determined as of the time of the petition, not of the transfer. *Brown v. Palmer Clay Products Co.*, 195 N.E. 122 (Mass. 1935).

Section 60a of the Bankruptcy Act defines a preference as a transfer within four months of the bankruptcy petition, by an insolvent debtor, when "the effect of the enforcement of such . . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." 36 Stat. 842 (1910), 11 U.S.C.A. § 96(a) (1927). One construction of this section is that it applies to transfers which enable one creditor to obtain a greater percentage at the time of the transfer. Another view extends it to transfers which in the future will effect such inequality. 4 Remington, Bankruptcy § 1813 (3d ed., 1923). Thus, a payment when the debtor's assets would permit like payments to all creditors is not preferential under the first construction (*Peck & Co. v. Whitmer*, 231 Fed. 893 (C.C.A. 8th 1916); *Haas v. Sachs*, 68 F. (2d) 623 (C.C.A. 8th 1933)), while it is preferential under the second if the ultimate result of the transfer, in view of the failure to make equal payments to all creditors, is that one creditor obtains a greater percentage of his debt than do the others. *Rubenstein v. Lottow*, 220 Mass. 156, 111 N.E. 973 (1916); *Commerce-Guardian Trust & Saving Bank v. Devlin*, 6 F. (2d) 518 (C.C.A. 6th 1925); *Eyges v. Boylston National Bank*, 294 Fed. 286 (D.C. Mass. 1923).

Under § 60b, a voidable preference exists when an insolvent debtor makes a transfer within the four month period, if the "transfer *then* operate as a preference, and the person receiving it . . . . shall *then* have reasonable cause to believe" that the transfer would effect a preference. 36 Stat. 842 (1910), 11 U.S.C.A. § 96(b) (1927). According to one interpretation, based upon the use of the words "then operate" and "then have reasonable cause to believe," the determination of the preferential character of a transfer must be made as of the time of the transfer because the word "then" is taken as referring to a time specified: the time of the transfer. If at that time the creditor has